Supreme Court, U. S.
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NO. 75-1672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON,
Appellants,

v.

LINUS HOFFMAN and WALTER SPENCER d/b/a ORBIT AUTOMOTIVE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

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NO. .....

IN THE

Supreme Court of the United States

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON,
Appellants,

v.

LINUS HOFFMAN and WALTER SPENCER d/b/a ORBIT AUTOMOTIVE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the United States District Court for the District of New Mexico entered January 20, 1976, dismissing with prejudice appellants' complaint which sought declaratory and injunctive relief against the New Mexico Mechanic's and Garagemen's Lien Statutes. Appellants in their complaint allege that said statutes violate the due process guarantees of the Fourteenth Amendment to the United States Constitution. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the District Court (Appendix A, *infra*) is not yet reported.

JURISDICTION

This action was instituted by Appellants in the District Court for the District of New Mexico pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343, seeking declaratory and injunctive relief against certain portions of the New Mexico Mechanic's and Garagemen's Lien Statutes.

On January 20, 1976, a three-judge court, convened pursuant to 28 U.S.C. § 2282 filed an opinion and an order (Appendix B, *infra*) dismissing Appellants' complaint, having concluded that there was no color of state law or state action involved. A notice of appeal to this court was filed on March 19, 1976. (Appendix C, *infra*) The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 US.C. § 1253.

STATUTES INVOLVED

The relevant portions of the New Mexico Mechanic's and Garagemen's Lien (§§ 61-3-1, 2.1, 11, 12, 13, 17 and 18 N.M.S.A. 1953 Comp., as amended) are set forth in Appendix D, *infra.*

The relevant portionf of the New Mexico Motor Vehicle Code (§§ 64-4-7 and 8, N.M.S.A. 1953 Comp., as amended are set forth in Appendix D, *infra.*

The statute establishing the jurisdiction of the three-judge court (28 U.S.C. § 2281) is set forth in Appendix D, *infra.*

QUESTIONS PRESENTED

1) Whether the state is sufficiently involved in the creation and enforcement of the New Mexico Garagemen's and Mechanic's Liens on motor vehicles to constitute state action within the meaning of 42 U.S.C. § 1983.

2) Whether the ruling of the three-judge district court below contravenes 28 U.S.C. § 2281 and the clear mandates of this Court.

STATEMENT OF THE CASE

In October, 1973 Appellants' automobile was repaired by Appellees. After repeated difficulties with the car Appellants returned the car to Appellees in December, 1973 for a determination of continued mechanical problems. Without Appellants' authorization Appellees again repaired the automobile and demanded an additional $111.07. When Appellants refused to pay Appellees refused to relinquish possession of the vehicle.

In April, 1974 Appellants received notice that Appellees would advertise and sell the vehicle pursuant to § 61-3-11 N.M.S.A. 1953 Comp., as amended, to satisfy a Mechanic's Lien invoked pursuant to § 61-3-1 N.M.S.A. 1953 Comp., as amended, in the amount of $111.07 and a Garagemen's or storage lien invoked pursuant to § 61-3-17 N.M.S.A. 1953 Comp., as amended, in the amount of $337.00. Appellants were not afforded notice or an opportunity to be heard prior to the assertion of the liens, and Appellants' demand for the release and return of the vehicle was refused.

This action was filed in Federal District Court on April 23, 1974 against Appellees and the State Magistrate

Court Judges in Bernalillo County who have enforcement powers under the relevant statutes. The complaint was accompanied by an application for the convening of a three-judge court. On April 25, 1974 the Court (Payne, J.) entered a temporary restraining order against Appellees barring the sale of the vehicle. A three-judge court was convened on May 6, 1974, but on July 18, 1974 the court granted a motion to dismiss on behalf of the defendant judges, while simultaneously denying a motion to remand to the single judge. The three-judge court denied Appellants' motion to join the Commissioner of Motor Vehicles on August 29, 1974, and simultaneously dismissed the Commissioner as a party defendant in the companion case of *Segovia v. Cohn*, Civil Action No. 74-157 ((D. N.M.). Trial was held, in consolidation with *Segovia*[1] on September 30, 1974. Appellants contended at trial that the statutory provisions creating, effectuating and enforcing the Mechanic's and Garagemen's Liens were violative of due process, and Appellants sought declaratory and injunctive relief against the relevant portions of the statutes involved. On January 20, 1976 the three-judge court dismissed Appellants' complaint with prejudice finding no state action to support the claim under 42 U.S.C. § 1983.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. THE LOWER COURT OPINION EMASCULATES THE STATE ACTION DOCTRINE AS DEVELOPED BY THIS COURT AND MISCONSTRUES THIS COURT'S RECENT OPINIONS ON THE SUBJECT.

"The mere fact that a business is subject to state regulation does not by itself convert its action into that of

[1]As of the date of this filing the companion case had yet to be decided.

the state for purposes of the Fourteenth Amendment." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The inquiry must focus on the closeness of the nexus between the state and the challenged activity, *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 176 (1972), requiring a detailed inquiry to determine if the test is met. *Jackson v. Metropolitan Edison Co.*, *supra* at 351. In failing to make such a "detailed inquiry," and in misplacing reliance on inapplicable cases involving self-help remedies, the lower court opinion viturally destroys the state action doctrine in the District of New Mexico.

When the necessary "detailed inquiry" is made in this case two central and critical factors emerge which clearly establish state action:

1) Enforcement of the liens in this case requires direct action by state officials (the Department of Motor Vehicles) in the exercise of authority conferred by state law. *See Adickes v. S. H. Kress and Company*, 389 U.S. 144 (1970); *Wall v. King*, 206 F.2d 878 (1953); *Younger v. Harder*, 361 F. Supp. 64, (D. Kan. 1973); *Adams v. Department of Motor Vehicles*, 11 Cal.3d 146, 113 Cal. Rpt. 145, 520 P.2d 961 (1974). The entire process of sale and transfer of title is done on forms required by the state pursuant to instructions provided by the state. *See Parks v. "Mr. Ford,"* 386 F. Supp. 1251, 1260 (E.D. Pa. 1975). Furthermore, the Department of Motor Vehicles must re-register and issue new certificates of title to transferees acquiring title under the sale provisions of the liens in question, thereby insuring that the liens are "specifically authorized and approved" by the state. *Jackson v. Metropolitan Edison Co.*, *supra* at 354.

2) The statutory scheme at issue rests in a private individual (the lienor) the performance of a function (execution sale) which has traditionally been performed

by the state. *United States v. Classic*, 313 U.S. 301 (1940); *Caesar v. Kiser*, 387 F. Supp. 645 (M.D. N.C. 1975); *Hernandez v. European Auto Collision Inc.*, 346 F. Supp. 313 (E.D. N.Y. 1972); *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170 (1973). Pursuant to §§ 61-3-11 and 61-3-12 N.M.S.A. 1953 Comp., as amended, the state has delegated to the lienor of a motor vehicle the traditional governmental function of lien enforcement. The state thereby authorizes and enables the lienor to unilaterally determine a property claim against another, execute upon a lien and formally dispose of the property by sale—all of which are powers "traditionally the exclusive prerogative of the state." *Jackson v. Metropolitan Edison Co.*, *supra* at 353.

The Uniform Commercial Code self-help cases cited by the lower court, are no more helpful to the inquiry than its gross misreading of the requirements of *Jackson v. Metropolitan Edison Co.*, *supra*. First of all the self-help cases involve the regaining of property *owned* by the lienholder, not the divestiture of ownership by the lienholder as we have in the instant case. Secondly, the self-help cases do not involve the aid of a government official to fully effectuate the enforcement of the lien as is required in the final and necessary step toward enforcement of the instant liens.

The due process guarantees in the case presented are not hollow rights. The purpose of those guarantees is to protect the individual in the use and possession of his or her property, and to minimize unfair or mistaken deprivation. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Where the combination of Mechanic's and Garagemen's Liens forces payment of a *disputed* bill under threat of virtual forfeiture of one's titled possession, the unfairness and potential for mistake are so gross as to necessitate the protection of due process.

The disputed and often unauthorized charges do not pose the only problem. Under the statutory scheme here at issue non-payment of the disputed bill renders the owner of the vehicle liable for escalating and unlimited storage charges which can rapidly exceed the value of the vehicle. All of this can and does take place without full notice to the owner until the car is placed for sale, and even then the statutes do not allow the owner any method for challenging the underlying disputed basis for the sale. The ultimate effect of these liens is to bypass the judicial process and to allow the swift transfer of property *ownership* by unilateral, non-judicial action.

This kind of unfairness crys out for correction, and despite the correcting influence of virtually every other court which has squarely faced the sale and title transfer provisions of such liens,[2] the abuse will continue unabated in New Mexico if this decision is allowed to stand.

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[2] Hernandez v. European Auto Collision Inc., 487 F.2d 378 (2d Cir. 1973) (sale provisions—New York garagemen's lien); Caesar v. Kiser, 387 F. Supp. 645 (M.D. N.C. 1975) (sale provisions—North Carolina mechanic's and garagemen's liens); Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974) (three judge court) (sale provision—Kentucky mechanic's lien); Lee, et al. v. Cooper, et al., Civil No. 74-104 (D. N.J. March 25, 1974) (New Jersey garage keepers lien and sale provisions) (unreported); Straley v. Gassaway Motor Co. Inc., 359 F. Supp. 902 (S.D. W.Va. 1973) (West Virginia repairmen's lien and sale provisions); Mason v. Garris, 360 F. Supp. 420, *mod.* 364 F. Supp. 452 (N.D. Ga. 1973) (three judge court) (Georgia mechanic's lien and sale provisions); Ford, et al. v. Dean OK Tire Store, Inc., Civil No. LV 1974 (D. Nev., filed February 9, 1974) (Nevada mechanic's and garagemen's liens and sale provisions) (unreported); Adams v. Department of Motor Vehicles, 11 Cal.3d 146, 113 Cal. Rpt. 145, 520 P.2d 961 (1974) (sale provisions—California garagemen's lien); Whitmore v. New Jersey Division of Motor Vehicles, 137 N.J. Super. 492, 349 A.2d 560 (1975) (sale provisions—New Jersey garage keepers lien); *but see* Parks v. "Mr. Ford," 386 F. Supp. 1251 (E.D. Pa. 1975) (Pennsylvania repairmen's lien and sale provisions); *but cf.* Phillips v. Money, 503 F.2d 990 (7th Cir. 1974) cert. denied, 420 U.S. 934 (1975) (Indiana mechanic's lien—sale provisions not at issue).

2. THE ACTION OF THE THREE-JUDGE COURT BELOW, DISMISSING APPELLANTS' COMPLAINT ON THE MERITS OF THEIR CONSTITUTIONAL CLAIM VIOLATES THE PROVISIONS OF 28 U.S.C. § 2281 AND THE CLEAR MANDATES OF THIS COURT.

It is axiomatic that three-judge court jurisdiction pursuant to 28 U.S.C. § 2281 hinges in part on the presence of a state officer as a party defendant, and absent such a party defendant a three-judge court lacks jurisdiction. *See, e.g., Board of Regents of the University of Texas System v. New Left Education Project,* 404 U.S. 541 (1972); *Moody v. Flowers,* 387 U.S. 97 (1967); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973). Furthermore, although a three-judge court is properly convened circumstances may arise requiring its dissolution and final action by the one judge rather than the three-judge court. *Perez v. Ledesma,* 401 U.S. 82, 87 (1971); *Hernandez v. European Auto Collision, Inc., supra* at 382.

At the time of final decision in this case, despite the efforts of Appellants, no state officer remained as a party defendant. The action as originally filed named State Magistrate Court judges as defendants, based on their statutory duty to enforce the liens in question through criminal sanctions. Given that configuration of the case an order was entered on May 6, 1974 granting Appellants' application for convening a three-judge court. *See, Lindsey v. Normet,* 405 U.S. 56 (1972). A motion to dismiss on behalf of the judges was granted by the court on July 18, 1974 while the companion motion to remand to one judge was denied.

Subsequently, Appellants sought leave to add the State Commissioner of Motor Vehicles as a party defendant,

based on the statutory duty of his department with respect to enforcement of the sale provisions of the liens. That motion was denied on August 29, 1974 and contemporaneously the same individual was dismissed as a party defendant from the companion case *Segovia v. Cohn, supra.*

The court below acted in such a way as to divest itself of jurisdiction (by refusing to join the Commissioner of Motor Vehicles) while disposing of the case on its merits as if it had jurisdiction. This irregular and inexplicable action has left Appellants in a dilemma and horribly confuses the status of three-judge court law in this district.

If appeal had been taken to the Court of Appeals, Appellants would be doing so despite a clear decision by a three-judge court resting "upon resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley,* 420 U.S. 799, 804 (1975). Furthermore, if Appellants were successful in arguing to the Court of Appeals that the lower court erred in the denial of the motion to join a necessary state officer, Appellants would be placing the Court of Appeals in the position of having the find that the case is "required . . . to be heard by a district court of three judges," 28 U.S.C. § 1253, appealable only to this Court.

The only available avenue for Appellants in this situation was to bring the case to this Court seeking resolution of the substantial federal question raised by the merits (Question 1, *supra*). Appellants are compelled, however, to raise the three-judge court question as well. Recognizing that this Court "disposes of most mandatory appeals in summary fashion," *Gonzales v. Employees Credit Union,* 419 U.S. 90, 99 (1975), Appellants respectfully request an alternative relief, should the Court not be disposed to hear the merits, vacation and remand

for entry of a freshly appealable order by the one judge. *E.g., MTM, Inc. v. Baxley, supra* at 804; *Mitchell v. Donovan*, 398 U.S. 427, 431 (1970); *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83, 84 (1968).

Finally, despite the clear and repeated dictates of this Court to the contrary, *e.g., MTM, Inc. v. Baxley, supra; Gonzales v. Employees Credit Union, supra; Hagans v. Lavine*, 415 U.S. 528 (1974), the law in the District of New Mexico appears to be "once a colorable three-judge court case, always a three-judge court case." While this case, in its proper posture, as Appellants sought to have it, is a three-judge court case, the lower cannot have it both ways. Either a state officer is a proper party defendant, and the action of the three judges is subject to review in this Court, or the state officer is not, and the case must be decided by the single judge subject to review by the Court of Appeals.

CONCLUSION

For the reasons stated Appellants respectfully submit that the questions presented in this appeal are substantial and of broad public importance. Probably jurisdiction should be noted and the case granted plenary consideration with briefs on the merits and oral argument for resolution. In the alternative, the order of the court below should be summarily vacated and the case remanded for entry of a fresh decree by a single judge, appealable to the U. S. Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Date: May 14, 1976

APPENDIX A

FILED: JANUARY 20, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON,
Plaintiffs,

vs. NO. 74-220 Civil

LINUS HOFFMAN and WALTER SPENCER d/b/a ORBIT AUTOMOTIVE,
Defendants.

MEMORANDUM OPINION

The complaint seeks a remedy under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 and is an attack on the constitutionality of the New Mexico Mechanics and Garagemen's Lien Statute, N.M.S.A. § 61-3-1 et seq. The only defendant remaining in the case is Orbit Automotive, Inc.

The plaintiffs' arguments are directed to both the detention and sale aspects of the mechanics lien statutes. The Acts are a formalization of the common law at least up to the point of sale. The problems before us are not answered by Fuentes v. Shevin, 407 U.S. 67, and Sniadach v. Family Finance Corp., 395 U.S. 337. *See also* Sena v. Montoya, No. 9296 Civil (D.C.N.M.), and Sanchez v. Young, No. 9871 Civil (D.C.N.M.). The relationship under consideration are quite different from those in cases just cited because possession of the chattel

has theretofore been transferred by the owner to the garageman-creditor-lien-holder by the agreement for repair. Possession is given to the garage both for this repair and as a lienholder. These were also the common law consequences of the delivery of the car to the garage for repair. Postrepair possession, or the possibility thereof, is just as much within the contemplation of the parties as is the possession for repair. Upon the completion of the repair each of the parties has an "interest" in the car. The garageman has added parts and labor. *See* Ruocco v. Brinker, 380 F.Supp. 432 (S.D.Fla.). An application of Mitchell v. W. T. Grant Co., 416 U.S. 600, is indicated. It is apparent also that if, after the repair, possession is required to be revested in the owner of the car, the lien is destroyed and the original arrangement is completely changed. It would then become a credit transaction on an open account rather than a cash sale.

The transfer of possession, and the ultimate sale by publication or by judicial foreclosure by the lien holder in possession, is significant in the consideration of the basic "state action" issue. The Supreme Court in Burton v. Wilmington Parking Authority, 365 U.S. 715, and in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, has advanced several factors or tests to be applied to determine whether state action is present. These include the delegation of a public function to individuals, state authorization and encouragement of private conduct, and extensive state regulation.

There is no overriding public function performed or served by the statutes which, as mentioned above, are a codification of the common law. *See* Phillips v. Money, 503 F.2d 990 (7th Cir.), where the court said it is not sufficient if the statute "... merely establishes the legal context in which individuals conduct their private affairs." *See also* Jackson v. Metropolitan Edison Co.,

419 U.S. 345; Gibbs v. Titleman, 502 F.2d 1107 (3d Cir.); Parks v. "Mr. Ford," 386 F.Supp. 1251 (E.D.Pa.); James v. Pinnix, 495 F.2d 206 (5th Cir.); Melara v. Kennedy, ____ F.Supp. ____ (N.D.Calif.), 43 U.S.L.W. 2094.

It is argued that the state has authorized and encouraged detention and sale of automobiles in satisfaction of mechanic's liens in enacting the challenged statutes, and thus has made this formerly private action "state action." This is an application of one of the recognized factors. The statutes provide that the lien may be foreclosed in court, as an alternative to publication and sale. The argument has been rejected in other jurisdictions and is not compelling here. Jackson v. Metropolitan Edison Co.; Phillips v. Money; Gibbs v. Titleman; Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir.), *cert. denied* 43 U.S.L.W. 3281; Parks v. "Mr. Ford." The statutes here concerned are neutral. The decision to detain the car and to enforce the lien through a sale or judicial proceedings is up to the individual lienholder. There is no statutory requirement to so act. Phillips v. Money; Turner v. Impala Motors, 503 F.2d 607 (6th Cir.); Shirley v. State Nat'l Bank of Connecticut, 493 F. 2d 739 (2d Cir.).

The fact of extensive state regulation of a practice as a possible basis for finding state action was discussed in Jackson v. Metropolitan Edison, and Adams v. Southern California First National Bank, in connection with public utilities and UCC self-help repossession. The Jackson case seems to present the most pervasive regulatory scheme, but the Supreme Court decided no state action was there involved. Under the Jackson analysis, the New Mexico mechanic's lien statutes would not constitute state action. The court in Adams also found no state action. It should also be noted that the repossession authorized in Adams (also Turner, Gibbs and James)

involves a disruption of the status quo, while the detention involved here does not. There is no "symbiotic" relationship established as the term is used in Burton v. Wilmington Parking Authority.

The statutory provisions here urged by the plaintiff to constitute state action also include the title transfer provisions. These are basically for the benefit of the State in its recordkeeping functions, and create post-event procedures unrelated to possession of the car and only as a consequence of a sale by the lienholder.

Thus we find no color of state law, no state action under the challenged statute, and thus there exists no cause of action under 42 U.S.C. § 1983. The complaint must be dismissed.

s/ In Agreement; Signature Unavailable
UNITED STATES CIRCUIT JUDGE

s/ H. Vearle Payne
UNITED STATES DISTRICT JUDGE

s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED: JANUARY 20, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON,
Plaintiffs,

vs. NO. 74-220 Civil

LINUS HOFFMAN and WALTER SPENCER d/b/a ORBIT AUTOMOTIVE,
Defendants.

ORDER

THIS MATTER having come before the Court upon the complaint of the plaintiffs for damages, declaratory and injunctive relief, the Court having heard evidence and arguments of counsel at the time of the trail on the merits, and the Court having filed a Memorandum Opinion herein concluding that there is no color of State law nor State action under the challenge statute and, therefore, no cause of action under 42 USC § 1983, now, therefore,

IT IS ORDERED that the complaint and plaintiff's cause of action be, and the same hereby are, dismissed with prejudice, each side to bear their respective costs.

s/ In Agreement; Signature Unavailable
UNITED STATES CIRCUIT JUDGE

s/ H. Vearle Payne
UNITED STATES DISTRICT JUDGE

s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED: MARCH 19, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON,
Plaintiffs,

-vs- No. 74-220 Civil

LINUS HUFFMAN and WALTER SPENCER d/b/a ORBIT AUTOMOTIVE,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next of friend of CAROL GUSTAFSON, the above named Plaintiffs, hereby appeals to the Supreme Court of the United States from the final Order of a three-Judge District Court entered in this action on January 20, 1976, dismissing with prejudice Plaintiffs' Complaint and Plaintiff's cause of action. This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

Dated:
March 18, 1976.

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APPENDIX D

§*61-3-1. Liens for manufacture or repairs—Motor vehicles.*—All artisans and mechanics shall have a lien on things made or repaired by them for the amount due for their work, and may retain possession thereof until said amount is paid. Any person or corporation who repairs any motor vehicle or furnishes parts therefor, at the request or with the consent of any person lawfully in possession of any such motor vehicle, shall have a lien upon such motor vehicle or any part or parts thereof for the sum due for repairing the same, and for labor furnished thereon, and for all costs incurred in enforcing such lien and may detain such motor vehicle in possession until such lien be paid.

§*61-3-2.1. Penalty.*—Any person removing or attempting to remove any property from the possession of a person that possesses a lien as provided in sections 61-3-1 and 61-3-2 New Mexico Statutes Annotated, 1953 Compilation, without the written consent of the possessor of the lien, is guilty of a misdemeanor and shall be punished by a fine of not more than fifty dollars ($50.00), or by imprisonment for not more than thirty (30) days, or both.

§*61-3-11. Enforcement of liens—Optional methods.*—A. In order to enforce any lien under sections 61-3-1 through 61-3-18 New Mexico Statutes Annotated, 1953 Compilation, the procedure shall be the same as in the case of the foreclosure of a chattel mortgage if suit be filed in court. The lien claimant when the property subject to the lien is under his control or in his possession may, after the debt for which the lien is claimed becomes due and payable, serve the person or persons against whom the lien is sought to be enforced with a written notice or forward to the last known address of such

person, by certified or registered mail, return receipt requested, a written statement setting forth an itemized statement of the amount for the indebtedness, and if the same be not paid within ten (10) days after the service or mailing of said notice the property may be advertised by posting or publication as provided in section 61-3-12 New Mexico Statutes Annotated, 1953 Compilation, and sold to satisfy the indebtedness.

B. Where the property involved is a motor vehicle upon which a lien exists under sections 61-3-17 through 61-3-18 New Mexico Statutes Annotated, 1953 Compilation, then in addition to the ten-day notice of the debt under this section and the twenty-day notice of sale under section 61-3-12 New Mexico Statutes Annotated, 1953 Compilation, the motor vehicle shall be held for the following periods:

(1) for thirty (30) days where the vehicle is registered in this state; or

(2) for sixty (60) days where the vehicle is registered in a foreign jurisdiction or where the registration cannot be found in the records of this state.

C. Where the property on which the lien exists is a motor vehicle, the time periods referred to in subsection B of this section are to be used for the purpose of establishing ownership and the names and addresses of lienholders so that they may be given notice of the sale. The time periods shall be in lieu of the time period referred to in section 64-5-3 New Mexico Statutes Annotated, 1953 Compilation, but the provisions of giving notice to the state police of unclaimed vehicles shall still apply, and the lien claimant shall give such notice within five (5) days after the expiration of the ten-day notice period referred to in subsection A of this section. (As amended, 1973 pocket supplement.)

§*61-3-12. Advertisement and sale of property.*—If default be made in the payment of the debt, after such notice, it shall be lawful for the lien claimant or creditor, as provided in this article (61-3-1 to 61-3-13), to advertise and sell such property at public auction to the highest bidder for cash after giving at least twenty (20) days notice of such sale by (a) at least six (6) hand bills posted up in public places in the county in which such sale is to be made, or (b) by publishing once each week for two (2) successive weeks in some newspaper of general circulation in the county; such notices of sale shall set forth the time and place of sale and a description of the property to be sold, and the amount of indebtedness claimed under such lien.

§*61-3-13. Disposition of proceeds of sale—Purchase by lien claimant.*—After sale made as provided in the preceding section, the proceeds of such sale shall be applied to the payment of costs of advertising and making the sale and the satisfaction of the demand of the lien claimant, and the residue, if any, shall be refunded to the lien debtor; Provided, that the lien claimant shall not be precluded from bidding on or purchasing the property at such sale.

§*61-3-17. Lien for towing, storage or wrecker services for automobiles.*—All garage owners and persons engaged in the business of towing automobiles, storing automobiles or furnishing wrecker service shall have a lien on all automobiles towed, stored or upon which wrecker service is performed when such towing storage or wrecker service is furnished or performed at the request or with the consent of any person lawfully in possession of such automobile, for the reasonable value of such services and for costs incurred in enforcing the lien. A peace officer who requests towing, storage or wrecker service for a wrecked, abandoned or stolen vehicle shall be deemed a person lawfully in possession of such vehicle within the

meaning of this section. The lien created under this section shall be perfected under sections 61-3-11 and 61-3-12 New Mexico Statutes Annotated, 1953 Compilation.

§*61-3-18. Rights of holder of lien for automobile service.*—The person entitled to a lien hereunder may retain such automobile in his possession until such lien is paid. Such lien may be enforced in the manner now or hereafter provided for the enforcement of mechanics' liens in this state; or in the manner now provided under sections 82-411 and 82-412 of the New Mexico Statutes Annotated, 1929 Compilation (61-3-11, 61-3-12), or hereafter provided by any amendments thereof or any laws of New Mexico in substitution therefor.

§*64-4-7. Transfer by operation of law.*—(a) Whenever the title or interest of an owner in or to a registered vehicle shall pass to another by operation of law, as upon inheritance, bequest, order in bankruptcy or insolvency, execution sale, repossession upon default in performance in the terms of a lease or executory sales contract, or otherwise than by voluntary transrer, the transferee shall be subject to the provisions of this section.

(b) Notice of transfer by operation of law shall be signed by the executor, administrator, receiver, trustee, sheriff or other representative or successor in interest of the owner of the vehicle.

(c) The transferee, except as provided in the next paragraph shall secure a transfer of registration to himself and a new certificate of title upon proper application and upon presentation of the last certificate of title if available and such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of title or interest in or to chattels in such case.

(d) When the transferee does not operate or permit the operation of such vehicle upon the highways or when the transferee operates such vehicle only for purposes of immediate delivery or resale to another person and displays upon such vehicle the registration plates issued for such vehicle, the transferee shall not be required to secure a transfer of its registration or a new certificate of title, but upon transferring his title or interest to another person shall execute and acknowledge an assignment and warranty of title upon the certificate of title previously issued if available and deliver the same, also the documents of authority or certified copies thereof as may be sufficient or required by law to evidence the rights of such person, to the person to whom such transfer is made.

§*64-4-8. When division to re-register vehicle and issue new certificate.*—(a) The division upon receipt of a properly endorsed certificate of title, current registration evidence and proper application for registration or transfer of registration accompanied by the required fee, and when satisfied as to the genuineness and regularity of said transfer and of the right of the transferee to a certificate of title, shall re-register the vehicle as upon a new registration in the name of the new owner and issue a new certificate of title as upon an original application.

(b) The division shall retain and appropriately file every surrendered certificate of title, such file to be so maintained as to permit the tracing of title of the vehicles designated therein.

28 US.C. § 2281. Injunction against enforcement of State statute; three-judge court required.—An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order

made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1976

No. 75-1672

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON, Appellants,

vs.

LINUS HOFFMAN and WALTER SPENCER, d/b/a ORBIT AUTOMOTIVE, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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August 1976

In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein without direction for entry of a fresh judgment below, or, in the alternative to affirm the judgment sought to be reviewed on appeal.

The motion to dismiss is based on the ground that the appeal is not within the jurisdiction of this Court because it is not taken in conformity to statute. The alternative motion to affirm is based on the ground that it is manifest the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

In support of this motion Appellees incorporate by reference the Brief Amicus Curiae of the New Mexico Automotive Dealers Association filed contemporaneously herein.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF AMICUS CURIAE ON BEHALF LINUS HOFFMAN, *ET AL.*, URGING DISMISSAL OR AFFIRMANCE

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August 1976

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In the Supreme Court of the United States

October Term, 1976

No. 75-1672

IRVIN E. GUSTAFSON, individually and on behalf of all others similarly situated, and as next friend of CAROL GUSTAFSON, *Appellants,*

vs.

LINUS HOFFMAN and WALTER SPENCER, d/b/a ORBIT AUTOMOTIVE, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF AMICUS CURIAE ON BEHALF LINUS HOFFMAN, *ET AL.,* URGING DISMISSAL OR AFFIRMANCE

INTEREST OF THE NEW MEXICO AUTOMOTIVE DEALERS ASSOCIATION

The New Mexico Automotive Dealers Association is a non-profit unincorporated trade association organized under the laws of the State of New Mexico and comprised of ap-

proximately 140 new car franchised dealers throughout the State of New Mexico.

The Association is dedicated to the betterment of the automotive industry in the State of New Mexico through lawful concerted action, and in that regard has participated in several law cases where the interests of the automotive industry were at stake, including the case at bar at the District Court level.

As most members of the Association are as a part of their businesses engaged in the repair and maintenance of automobiles, the issues raised by this appeal are of concern to the Association. In view of the Court's request that the Appellees respond to the Appellants' Jurisdictional Statement and Appellees' apparent financial inability fully to support such effort, the Association in an attempt to assist the Court in resolving the issues raised by this Appeal have filed this brief with consent of the parties.

QUESTIONS PRESENTED

Your Amicus respectfully submits the following three questions are a more appropriate statement of the issues raised by this appeal:

1. Does the United States Supreme Court have appellate jurisdiction of an appeal from the decision of a three judge court where no state official remains as a party defendant in the action?

2. Does a private garageman's retention of an automobile as security for an unpaid repair bill under a state statutory lien constitute state action which is in violation of the Fourteenth Amendment of the United States Constitution?

3. Does a private garageman's election to sell an automobile against which a garageman's lien is held by public auction and actual sale of the automobile by public auction after due notice and alleged default on the underlying debt similarly constitute state action which is in violation of the Fourteenth Amendment of the United States Constitution?

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED WITHOUT DIRECTION FOR ENTRY OF A NEW JUDGMENT BELOW, BECAUSE, AS IS READILY DISCERNIBLE FROM THIS COURT'S PRIOR DECISIONS, JURISDICTION IS NOT PRESENT UNDER 28 U.S.C. §1253.

The appellate jurisdiction of this Court in this matter, if any, rests entirely upon 28 U.S.C. §1253. A necessary predicate to jurisdiction under 28 U.S.C. §1253 is that this suit must be a matter which was "required by any Act of Congress to be heard and determined by a district court of three judges." As Appellants readily admit (Jurisdictional Statement, pp. 8-9), one requirement for invoking three judge court jurisdiction is the presence of a state officer as a party defendant. 28 U.S.C. §2281; *Moody v. Flowers*, 387 U.S. 97 (1967). As this case now stands, no such defendant is present.

Although the absence of the Bernalillo County Magistrates as party defendants in this matter initially arose from the Magistrates' motion to dismiss, it must also be pointed out that the Appellants subsequently ratified that dismissal. Ratification occurred because subsequently and quite in-

explicably Appellants voluntarily moved to dismiss the Magistrates as party defendants. (Appellants' Motion, filed August 22, 1974). Appellants may have so moved in belated recognition of the applicability of *O'Shea v. Littleton,* 414 U.S. 488 (1974), since Appellants' Complaint did not contain even the remotest suggestion that Appellants were threatened with prosecution under §61-3-2.1, N.M. Stat. Ann. The lower court correctly ruled that Appellants' Motion was moot. (Order, filed August 29, 1974).

Thus, the only remaining possibility of a state officer as party defendant was the New Mexico State Commissioner of Motor Vehicles whom Appellants sought to join as an additional party defendant under Rules 15 and 21, F.R.Civ.P. The lower court's adverse ruling on Appellants' Motion to join the Commissioner of Motor Vehicles was a decision which is left to the ruling court's sound discretion. 3A J. Moore, Federal Practice ¶21.04[1], at 21-17 - 21-18 (2d ed. 1974). Although absence of a state officer as party defendant prevented Appellants from seeking injunctive relief against a state official, such absence in this case did not divest the district court of jurisdiction on Appellants' central claim that the statutes in question were unconstitutional. Indeed, even if the Commissioner of Motor Vehicles had been named a party defendant, his status would have been close to being nominal. *See Wilentz v. Sovereign Camp,* 306 U.S. 573, 579-580 (1939).

Without a state official as a party defendant it was not necessary to continue the convention of the three judge Court, and no direct appeal lies to this Court. *Perez v. Ledesma,* 401 U.S. 82 (1971).

On numerous prior occasions it has been stated if a three judge court is not required, no appeal will lie to this Court. *Gonzales v. Automatic Employees Credit Union,* 419

U.S. 90 (1974); *Board of Regents v. New Left Education Project,* 404 U.S. 541 (1972); *Perez v. Ledesma,* 401 U.S. 82 (1971); *Mitchell v. Donovan,* 398 U.S. 427 (1970) *(per curiam)*; *Moody v. Flowers,* 387 U.S. 97 (1967). This Court has further warned that the Court's appellate jurisdiction under 28 U.S.C. §1253 will be narrowly construed. *E.g., Hagans v. Lavine,* 415 U.S. 528 (1974).

Even if the order from which the appeal is taken has been issued by an unnecessarily convened three judge court, appellate jurisdiction in this Court is not established. *Gonzales v. Automatic Employees Credit Union,* 419 U.S. 90 (1974); *Board of Regents v. New Left Education Project,* 404 U.S. 541 (1972); *Mitchell v. Donovan,* 398 U.S. 427 (1970) *(per curiam).* Contrary to Appellants' apparent suggestion (Jurisdictional Statement, p. 9), a decision of an unnecessarily convened three judge court is not jurisdictionally tainted but rather treated as if entered by a single judge court. *See Perez v. Ledesma,* 401 U.S. 82, 86 (1971); *Gonzales v. Automatic Employees Credit Union,* 419 U.S. 90 (1974); *Moody v. Flowers,* 387 U.S. 97 (1967). Use of the three judge court in this matter was probably a conservative attempt to avoid nullification of the proceedings should any appellate court subsequently determine a three judge court decision was actually necessary.

Your Amicus respectfully urges this Court not to continue its practice of grace in directing that a fresh judgment be entered in this matter to allow a further appeal. While there may be areas of confusion on some aspects of this Court's appellate jurisdiction over three judge court matters, clear and understandable precedent was available from which Appellants should have determined the proper method of appeal. Prominent warnings were readily accessible. 9 J. Moore, Federal Practice ¶110.03[3], at 83 (2d ed. 1975).

To grant Appellants additional opportunity to appeal will apparently tax Appellees financially. Further, in view of Appellants' continued contention that the repairs were unauthorized (Jurisdictional Statement, p. 3), this Court should save Appellees time and expense of having to point out to the Court of Appeals that the lien is not even in issue because §61-3-1, N.M. Stat. Ann., requires that repairs be authorized before a lien may attach.

As a final matter, dilemma and confusion regarding the status of three judge court law in the District of New Mexico should not cause substantial concern. It seems reasonably assured that three judge court jurisdiction will be severely limited by S. 537, 94th Cong., 1st Sess., which at the time of writing this brief had passed both houses of Congress but had not yet been signed by the President.

II.

IN THE ALTERNATIVE, THE DECISION OF THE LOWER COURT SHOULD BE SUMMARILY AFFIRMED.

A. *The Complained Conduct Does Not Constitute State Action.*

For Appellants to prevail on their claim under the Fourteenth Amendment they must establish that the complained conduct constitutes state action. *The Civil Rights Cases,* 109 U.S. 3 (1883).

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), requires careful application of the tests for state action. State action does not exist merely because the Defendant receives some state benefit or is subject to some state regulation.

Moose Lodge, supra at 173; *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974).

Neither of the two tests of state action in issue here (Jurisdictional Statement, pp. 5-6) are satisfied in this case. The operation of the New Mexico lien statutes do not involve direct acts of state officials or closely associate any acts of state officials with the alleged deprivation of rights as found in *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Young v. Harder,* 361 F.Supp. 64 (D. Kan. 1973). In contrast, a garageman's retention of a vehicle is a voluntary and independent act, without any action by state officials.

If a garageman does thereafter elect to foreclose the lien by giving notice and subsequently selling the vehicle by public auction, he is the one who accomplishes those acts. The Department of Motor Vehicles' involvement in transferring title is a mere record-keeping activity. Such *de minimis* involvement hardly rises to the level of state action. *Parks v. "Mr. Ford",* 386 F.Supp. 1251 (E.D.Pa. 1974, 1975); *cf., Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1973, 1974) (as modified on denial of rehearing), *cert. denied,* 419 U.S. 1006 (1974). This Court observed in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Nor can it be established that the New Mexico lien statute commands or authorizes an individual to act in a normally public function as found in *Adickes v. S. H. Kress*

& Co., 398 U.S. 144 (1970), and *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970). Retention of an automobile as security for an unpaid repair debt under a statutory lien which is declarative of the common law, R. BROWN, PERSONAL PROPERTY §13.2, at 396 (3d ed. 1975), can hardly be characterized as commanding or authorizing a private individual to act in a traditionally public function. Early innkeeper lien cases finding state action on this alter ego theory have been criticized. *Phillips v. Money*, 503 F.2d 990, 993 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *Parks v. "Mr. Ford"*, 386 F.Supp. 1251, 1260-1262 (E.D.Pa. 1974, 1975); *Anastasia v. Cosmopolitan National Bank of Chicago*, 527 F.2d 150, 157 (7th Cir. 1975), *cert. denied*, ... U.S. ...., 96 S. Ct. 1143 (1976); *Davis v. Richmond*, 512 F.2d 201 (1st Cir. 1975).

While admittedly a small collection of trial court decisions striking down garageman liens or their enforcement by sale does exist, none of these decisions with the possible exception of *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973), have been issued by the Courts of Appeals. It would appear from the analogous situation involving repossessions under the Uniform Commercial Code that given the opportunity the Courts of Appeals would find no state action present. *Shirley v. State National Bank*, 493 F.2d 739 (2nd Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Gibbs v. Titelman*, 502 F.2d 1107 (3rd Cir.), *cert. denied*, 419 U.S. 1039 (1974); *Brantley v. Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir.) *(per curiam), cert. denied*, 419 U.S. 1034 (1974); *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973, 1974) (as modified on denial of rehearing), *cert. denied*, 419 U.S. 1006 (1974). The state's involvement in transfer of title after such a repossession is as "pervasive" as the garageman lien situation. *E.g., Kirksey v. Theilig*, 351 F.Supp. 727 (D. Colo. 1972).

B. *Even If State Action Is Present, The Lien Statutes Are Not Unconstitutional On Their Face Or In Operation.*

The teaching of *Mitchell v. W. T. Grant Company*, 416 U.S. 600 (1974), is that no absolute requirement of notice and hearing exists prior to prejudgment deprivation of property. Before such a requirement is to be imposed, the debtor's interest must outweigh the interests of the creditor. Balancing these interests in the context of the New Mexico garagemen's lien statute indicates no notice or hearing requirement should be imposed.

First, no dispossession takes place. Indeed, the lien cannot attach unless there was a consensual transfer. §61-3-1, N.M. Stat. Ann. New Mexico law does not even permit dispossession. *Mathieu v. Roberts*, 31 N.M. 469, 247 P. 1066 (1926).

The absence of a dispossession in the garagemen's lien cases has been frequently cited as justification for not imposing a notice and hearing requirement. *Phillips v. Money*, 503 F.2d 990, 994-995 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 113 Cal. Rptr. 145, 520 P.2d 961 (1974). Similarly, the absence of dispossession in the analogous warehousemen's lien situation has been considered dispositive. *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F.Supp. 464 (E.D.N.Y. 1971).

Second, the creditor-garageman has not contemplated extending credit to the car owner and has not therefore taken those precautions which would normally accompany a

credit transaction. In a true sense, therefore, the garageman through his repairs acquires a substantial property interest in the automobile.

Elimination of the garageman's lien would dispossess the garageman, change the *status quo* and frustrate the expectations of the parties to the repair transaction. *Phillips v. Money,* 503 F.2d 990, 994-995 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975). Elimination of the garagemen's lien forces the garageman to assume a new risk. In contrast, in the *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972), type of transaction this risk has already been assumed by the creditor.

Third, where a garageman has gained a substantial property interest, the availability of alternative remedies to the automobile owner should under the balancing test of *Mitchell v. W. T. Grant Company,* 416 U.S. 600 (1974), be deemed adequate. These remedies include an action for replevin or conversion.

CONCLUSION

For the foregoing reasons, the New Mexico Automotive Dealers Association respectfully urges this Court to dismiss the appeal without direction for entry of a fresh judgment below or, in the alternative, summarily to affirm the judgment below.

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